

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

KIRK EBERLE,

Petitioner

v.

C-1-01-614

ANTHONY BRIGANO,

Respondent

ORDER

This matter was referred pursuant to 28 U.S.C. § 636 to the United States Magistrate Judge for consideration and report on the Petition for Writ of Habeas Corpus filed by the petitioner pursuant to 28 U.S.C. § 2254. The matter is before the Court upon the Report and Recommendation of the Magistrate Judge (doc. no. 16) recommending that the Petition for Writ of Habeas Corpus be denied with prejudice, petitioner's objections thereto (doc. no. 17) and respondent's response (doc. no. 18).

Upon careful consideration of the petitioner's objections, and upon conducting a *de novo* review of the record, especially in light of petitioner's objections and the request of respondent made in his response, the Court finds that the parties' contentions have either been adequately addressed and properly disposed of by the Judge or present no particularized arguments that warrant specific responses by this Court. The Court finds that the Judge has accurately set forth the controlling principles of law and properly applied them to the particular facts of this case and agrees with the Judge that petitioner's convictions are supported by sufficient evidence.

Accordingly, the Court accepts the factual findings and legal reasoning of the Magistrate

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Judge and hereby **ADOPTS AND INCORPORATES BY REFERENCE HEREIN** his Report and Recommendation dated December 2, 2003. The Petition for Writ of Habeas Corpus is, therefore, **DENIED WITH PREJUDICE.**

A certificate of appealability should issue with respect to the dismissal on the merits of petitioner's claim for relief alleged in the petition as ground one because, for the foregoing reasons, petitioner has made a substantial showing of the denial of a constitutional right that is remediable in this proceeding. See 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b). Petitioner has shown that reasonable jurists could debate whether the claim alleged as ground one in the petition should have been resolved in a different manner or that the issue presented was "adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 323-324 (2003) (quoting *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000)) (in turn quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)).

Pursuant to 28 U.S.C. §§ 1915(a), this Court certifies that an appeal from this Order would be taken in good faith and therefore **GRANTS** petitioner leave to appeal *in forma pauperis* upon a showing of financial necessity. *See Fed. R. App. 24(a); Kincade v. Sparkman*, 117 F.3d 949, 952 (1997).

This matter is **DISMISSED AND TERMINATED** on the docket of this Court.

IT IS SO ORDERED.

s/Herman J. Weber

Herman J. Weber, Senior Judge
United States District Court